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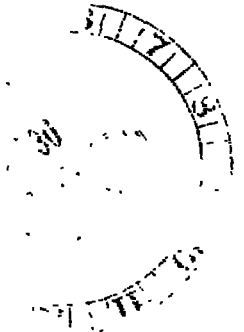
BEFORE THE  
SURFACE TRANSPORTATION BOARD

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FINANCE DOCKET NO. 35110

FLORIDA DEPARTMENT OF TRANSPORTATION  
- ACQUISITION EXEMPTION -  
CERTAIN ASSETS OF CSX TRANSPORTATION

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**NATIONAL RAILROAD PASSENGER CORPORATION'S  
COMMENTS IN OPPOSITION TO FLORIDA DEPARTMENT  
OF TRANSPORTATION'S MOTION TO DISMISS,  
AND RELATED PETITION TO REVOKE EXEMPTION**

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Dated: April 30, 2010

BEFORE THE  
SURFACE TRANSPORTATION BOARD

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AND RELATED PETITION TO REVOKE EXEMPTION**

The National Railroad Passenger Corporation (“Amtrak”) opposes the motion to dismiss filed in this proceeding by the Florida Department of Transportation (“FDOT”). FDOT predicates its motion on the Board’s *State of Maine* precedent.<sup>1</sup> For reasons explained below, the proposed line-sale transaction is subject to the Board’s approval requirements and regulations related to such transactions, and does not fall within the limited jurisdictional exception to the requirements of 49 U.S.C. § 10901 established under *State of Maine*. Accordingly, FDOT’s motion to dismiss should be denied. Further, the proposed transaction does not satisfy the public convenience and necessity requirements established under Section 10901, and for that and other reasons the exemption accorded the transaction should be revoked.

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<sup>1</sup> See *Maine, DOT – Acquisition & Operation Exemption – Me. Central R.R.*, 8 I.C.C.2d 835 (1991) (“*State of Maine*”).

## FACTUAL BACKGROUND

As explained in its Exemption Notice and accompanying Motion To Dismiss,<sup>2</sup> FDOT proposes to acquire approximately 61.5 miles of line (the “Orlando Line”) in the Orlando, FL area from CSX Transportation, Inc. (“CSXT”). Under the proposed transaction, FDOT would acquire the subject 61.5-mile line and provide soon-to-be-instituted commuter service over the line, with operations extending to 17 stations located between DeLand, FL on the north, through downtown Orlando, and as far south as Kissimmee/Poinciana, FL. CSXT would continue to provide freight service over the line, pursuant to a perpetual easement it would retain. *See generally* Motion of Florida Department of Transportation To Dismiss Notice of Exemption, STB Finance Docket No. 35110 (Apr. 3, 2009) (“FDOT Motion To Dismiss”).

Two Amtrak passenger trains a day operate in each direction over the Orlando Line: the *Silver Star* and the *Silver Meteor*. Amtrak’s *Auto Train* service also operates over the line to reach its southern terminus at Sanford, Florida, north of Orlando. *Id.* at 4.

Amtrak currently operates over the Orlando Line pursuant to a 1999 operating agreement with CSXT. FDOT appears to contemplate that this agreement initially will continue to govern Amtrak’s operations, although it also “contemplates that FDOT and Amtrak will eventually enter into a separate agreement governing Amtrak’s operation on the Orlando Line.” *Id.* at 20 & n.21. Indeed, FDOT has positioned itself to become the sole arbiter of Amtrak’s operating rights, having agreed with CSXT that “any agreement for renewal or extension of Amtrak’s use

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<sup>2</sup> At FDOT’s request, the STB deferred consideration of its Motion To Dismiss and the related exemption application pending completion of the Florida legislative process. That process has now resulted in the Florida law amendment permitting FDOT to indemnify CSXT (but not Amtrak). On March 31, 2010, FDOT filed a letter with the STB requesting that the proceeding be reinitiated.

of the State Property beyond termination or replacement of the current Amtrak-CSXT Agreement shall be a matter between State and Amtrak. . . .”<sup>3</sup>

The effect of the FDOT transaction will be to introduce commuter traffic to the Orlando Line (to be operated under the name “Sun Rail”), where the line previously had supported only freight and Amtrak passenger traffic.<sup>4</sup> This introduction of commuter service carrying large numbers of passengers creates obvious liability exposures for all the line’s users.

Not surprisingly, a key issue attending the transaction has been indemnification: the ability of FDOT to indemnify CSXT and Amtrak for liabilities associated with its commuter operations. Under Amtrak’s operating agreement with CSXT, each company indemnifies the other on a no-fault basis for damages to its own personnel and property, with Amtrak bearing responsibility for injuries to Amtrak passengers.<sup>5</sup> In its negotiations with FDOT, CSXT sought a comparable indemnity from FDOT, as did Amtrak.

Florida’s sovereign immunity law presented a material impediment to the indemnities required by CSXT and Amtrak. Under that law, FDOT’s total liability for deaths or injuries was limited to \$200,000 per incident or occurrence. *See* Florida Stat. Ann. § 768.28(5). CSXT made

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<sup>3</sup> “Amended Central Florida Operating and Management Agreement,” § 3(l) (dated March 29, 2010 and filed by FDOT with the Board on March 31, 2010) (“FDOT/CSXT Amended Operating Agreement”).

<sup>4</sup> In addition, it is contemplated that FDOT will assume responsibility for maintaining and dispatching the Orlando Line, a role that has historically been played by CSXT. *See* FDOT Motion To Dismiss at 8-9.

<sup>5</sup> *See* Verified Statement of Paul Vilter (“Vilter V.S.”), to which is appended (as part of Exhibit 1) the “Risk of Liability” provision contained in the “Agreement between National Railroad Passenger Corporation and CSX Transportation, Incorporated” (June 1, 1999) (the “Amtrak/CSXT Operating Agreement”). The indemnity set forth in this provision addresses other risk allocations beyond those referenced in the text above.

legislation authorizing FDOT to provide a no-fault, insurance-backed indemnification of CSXT a condition precedent to sale of the Orlando Line to FDOT.<sup>6</sup> Likewise, a July 17, 2008 memorandum of understanding (the “MOU”) between Amtrak and FDOT stated that the issues of sovereign immunity, indemnity, liability and legislation had to be resolved before the parties could reach the agreements contemplated under the memorandum.<sup>7</sup>

In response to CSXT’s indemnity requirement, FDOT sought and obtained a legislative exception to this sovereign immunity law. But the exception extended only to “the freight rail operator, or its successors, from whom [FDOT] has acquired a real property interest in the rail corridor,” and was only broad enough to permit FDOT to provide CSXT with the necessary indemnity. *See* Florida Stat. Ann. § 341.302(17). Despite Amtrak’s repeated admonitions that it would require a comparable indemnity, and FDOT’s obligations under the Amtrak-FDOT MOU, FDOT did not seek to have the legislative exception extend to Amtrak. As a consequence, FDOT cannot provide Amtrak with an enforceable indemnity, and FDOT’s liability for injuries to its commuter passengers remains subject to the sovereign immunity liability cap of \$200,000 per incident or occurrence.

The FDOT/CSXT Amended Operating Agreement incorporates detailed indemnity and insurance provisions consistent with the sovereign immunity waiver incorporated into Florida Stat. Ann. § 341.302(17). Pursuant to these provisions, each party indemnifies the other with respect to its employees and property, and FDOT indemnifies CSXT with respect to claims by commuters (other indemnities are also provided). *See* FDOT/CSXT Amended Operating

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<sup>6</sup> *See* “Contract for Sale and Purchase” between FDOT and CSXT (Nov. 30, 2007) (FDOT Motion to Dismiss, Ex. 1 at 23 & 32).

<sup>7</sup> *See* *Vilter V.S.*, Ex. 2

Agreement § 19. In addition, FDOT commits to secure not less than \$200 million of liability insurance and to make CSXT an additional insured under that policy, with the understanding that FDOT's indemnity obligations would be funded through this insurance.<sup>8</sup> *Id.*, § 21. The FDOT/CSXT Operating Agreement makes clear that "the amount of insurance required of State herein reflects the risks attendant with Commuter Rail Service," as well as "the risks attendant with the indemnification provided by State." *Id.*, § 21(e).

These are precisely the risks for which Amtrak has sought protection from FDOT. Amtrak entered into the July 17, 2008 MOU with FDOT to assist FDOT in advancing its application to the Federal Transportation Administration for federal funding. One provision of the MOU specified that issues "relating to sovereign immunity, indemnity, insurance, legislation and the rights, duties and obligations of the parties" remained unresolved, and that resolution of these would have to be achieved before Amtrak and FDOT could enter into the two agreements contemplated by the parties: (i) an operating agreement for Amtrak's continued operations over the Orlando Line , and (ii) a contractual services agreement, under which Amtrak would maintain FDOT commuter equipment. *See Vilter V.S., Ex. 2 at 9.*

Because FDOT did nothing to obtain legislative authority that would resolve the Amtrak-related sovereign immunity and associated indemnity issues referenced in the MOU, Amtrak was left with no choice but to terminate the MOU. In its January 21, 2010 MOU termination notice letter to FDOT, Amtrak explained that these issues "arise out of Florida's sovereign immunity laws that, according to FDOT, preclude FDOT from assuming the indemnity obligations for which CSX is responsible under the Amtrak-CSX Agreement, and limit FDOT's liability for

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<sup>8</sup> Under this arrangement, FDOT is permitted to have a deductible or self-insured retention of up to \$10 million. FDOT/CSXT Amended Operating Agreement § 21.

deaths or injuries caused by Sun Rail's operation to just \$200,000 per incident." *See Vilter V.S.*, Ex. 3 at 1. Emphasizing the critical point it had "repeatedly stated" to FDOT, Amtrak reiterated that:

[A]ny agreement between Amtrak and FDOT for the Central Florida Corridor must include the no-fault indemnity arrangement in the Amtrak-CSX Agreement, and legislation must be enacted that eliminates the impediments under Florida law to enforcement of FDOT's obligations under such provisions. Without such an arrangement, if Sun Rail commuter service commences and Amtrak continues to operate intercity trains over the Central Florida Corridor, Amtrak would face enormous additional liability exposure for death or injury claims by Sun Rail commuter passengers. Such increased liability and the financial risk it could represent to the Federal government, which directly funds Amtrak's operations, is simply unacceptable.

*Id.* at 2.<sup>9</sup>

## ARGUMENT

### **I. Because the Proposed Line Sale Would Both Transfer and Materially Impair CSX's Common Carrier-Based Obligations to Amtrak, the *State of Maine* Precedent Does Not Apply**

The acquisition of an active rail line, and the common carrier obligation that typically accompanies it, ordinarily requires Board approval under 49 U.S.C. §10901. This is so even if the acquiring entity is a noncarrier, including a state.<sup>10</sup> *See Common Carrier Status of States*,

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<sup>9</sup> This letter gave FDOT 30 days to develop "an acceptable solution to meet Amtrak's legitimate concerns." *See Vilter V.S.*, Ex. 3 at 1. In a February 22, 2010 letter to FDOT, Amtrak formally terminated the MOU, explaining that "FDOT has failed to provide Amtrak any communication that FDOT has recognized or tried to address [Amtrak's] legitimate business concerns . . . ." *See Vilter V.S.*, Ex. 4 at 1.

<sup>10</sup> References to the STB include its predecessor, the Interstate Commerce Commission (the "ICC").

*State Agencies*, 363 I.C.C. 132, 133 (1980), *aff'd sub nom. Simmons v. ICC*, 697 F.2d 326 (D.C. Cir. 1982). <sup>11</sup>

In its 1991 *State of Maine* decision, the Board articulated a very limited exception to its Section 10901 jurisdiction. The Maine Department of Transportation ("Maine DOT") sought to acquire 15.66 miles of rail line from the Maine Central Railroad ("MEC"), over which MEC's lessee – the Springfield Terminal Railroad ("ST") – was providing common carrier freight service. The transaction was structured, however, so that Maine DOT would only acquire the actual physical assets of the rail line. MEC would be given a permanent easement that would allow it (and its lessee, ST) to continue to provide freight service over the line, with the understanding that the common carrier obligation associated with the line would remain with MEC. The goal of the transaction was "to ensure long term freight service to shippers as well as facilitate future intrastate commuter operations." 8 I.C.C.2d at 837 n.7.

Maine DOT filed an exemption application requesting that the STB review the transaction under its exemption authority, but also moved to *dismiss* its exemption application on grounds that the STB did not have jurisdiction over the transaction. Maine DOT argued that it

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<sup>11</sup> FDOT portrays the proposed transaction as one that would be governed by Section 10901 but for its invocation of the *State of Maine* exception. However, it appears from the record that the proposed transaction should be reviewed under 49 U.S.C. § 11323, a provision to which the Board's *State of Maine* precedent does not apply. FDOT notes in its "Verified Notice of Exemption" (filed April 2, 2009) that in 1988 it "acquired a CSXT rail line between West Palm Beach and Miami, Florida in order to initiate commuter rail operations over the line." *Id.* at 3 n.3. This transaction was consummated without any STB authority, or any determination by the STB that FDOT would not become a rail carrier by virtue of its ownership of the West Palm Beach/Miami line. (FDOT asserts there were "informal consultations with Interstate Commerce Commission Staff at the time," but provides no particulars or any explanation for its failure to present the transaction to the STB. *Id.*). If FDOT is already a rail carrier by virtue of its ownership of the West Palm Beach/Miami line, its acquisition of the Orlando Line from CSXT would be subject to Board review under 49 U.S.C. 11323(a)(2) ("A purchase, lease, or contract to operate property of another rail carrier by any number of rail carriers.").



would not actually be acquiring a “railroad line” under Section 10901 because “(1) it has no intention or ability to assume operation; (2) state law prohibits it from operating as a carrier; and (3) it is proposing only to acquire physical assets from the railroad, the acquisition of which would not alter MEC’s operations or obligation to provide service over the line.” *Id.* at 836.

The STB largely agreed,<sup>12</sup> noting that “[h]ere, however, no common carrier rights or obligations are being transferred; . . . MEC retains the common carrier obligation and . . . it could not cease to offer service on the line without [STB] permission.” *Id.* at 837. The Board was significantly influenced by the fact that MEC retained a “permanent and unconditional easement” giving it “the full right and necessary access to maintain, operate and renew the line,” and that “nothing in the transfer of underlying assets in this case would disenable MEC from meeting its common carrier obligations.” *Id.* As explained by the Board,

The permanent and unconditional easement which it retains ensures MEC (and its successors and assigns) both the full right and necessary access to maintain, operate and renew the line. In short, this record persuades us that there will be no alteration of any common carrier obligations here and MEC has done nothing that impairs its ability to fulfill its continuing common carrier obligation. MEC has both the intent and unconditional ability to continue to assume and exercise its common carrier rights and obligations. . . . Therefore, [Board] authorization is not required for the transfer of assets in this case.

*Id.*

Based on these considerations, the Board concluded that its “authorization is not required for the transfer of assets in this case,” (*id.*) and the case was dismissed. But the Board cautioned that “[b]ecause of the significant possibility that this sort of transaction could affect the carrier’s

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<sup>12</sup> The STB did not find the second argument – concerning the state law prohibition on Maine DOT operating a rail line – to be persuasive. It noted that if as a matter of federal law the STB determined that the transaction resulted in Maine DOT acquiring a common carrier obligation (which ultimately it did not), then Maine DOT would simply be in violation of state law. *Id.* at 837 n.5.

ability to meet its common carrier obligations, unless there are adequate protections built into the transaction, we intend to examine these transactions closely and will make a determination based on the facts and circumstances of each case.” *Id.* at 838.

Following its *State of Maine* decision, the Board has had a number of line-sale transactions submitted to it where the seller retained the common carrier obligation associated with the line and an easement to use the line for that purpose, and the buyer acquired only the physical assets of the line. Repeatedly, in assessing whether it should dismiss the application associated with the proposed line acquisition on *State of Maine* grounds, the Board has focused on whether in fact the transaction was structured so as to assure that the seller’s common carrier obligations remained unimpaired and fully intact, both contractually and operationally.

“[I]f common carrier obligations are not being transferred and consummation would not impair such rights or disenable the performance of such obligations the transaction is not subject to [Board] jurisdiction.” *Chicago Terminal Corp. – Acquisition of Leasehold Exemption – Elgin, Joliet & Eastern Ry.*, Finance Dkt. No. 32495, 1994 WL 732863, at \*2 (I.C.C. served Jan. 12, 1999). *Accord, e.g., Port of Seattle – Acquisition Exemption – Certain Assets of BNSF Ry.*, STB Finance Dkt. No. 35128, 2008 WL 4718447, at \* 3 (S.T.B. served Oct. 27, 2008) (“[W]e will look to whether the third-party operator has obtained a permanent easement and sufficient interest and control over the Line to permit it to carry out the common carrier obligation.”); *Maryland Transit Administration – Petition for Declaratory Order*, STB Finance Dkt. No. 34975, 2007 WL 2936134, at \*4 (S.T.B. served Oct. 9, 2007) (“In general, a purchaser of a rail line will not be found to have acquired common carrier rights or obligations over the line if the selling rail carrier retains a perpetual and exclusive easement to provide freight service over the rail line and certain other conditions are met. . . . [T]he Board also takes into account other

factors that can affect the rail carrier's ability to continue to meet its common carrier obligation, such as the operating agreement between the purchasing party and the freight railroad.”).

Here, for the first time, the Board has before it a line-sale transaction being advanced under the *State of Maine* jurisdictional exception that will have a material adverse effect on the seller's ability to meet its common carrier responsibilities as those responsibilities pertain to providing services and facilities for Amtrak intercity passenger service under the Rail Passenger Service Act of 1970 (“RPSA”).<sup>13</sup> To fully understand the relationship between CSXT's common carrier responsibilities and Amtrak's utilization of its services and facilities pursuant to the Amtrak/CSXT Operating Agreement, it is necessary to review how that relationship evolved.

Prior to enactment of the RPSA, the common carrier responsibilities of CSXT's predecessors encompassed both rail freight and rail passenger obligations. Under RPSA Section 401(a), railroads were “relieved of all [their] responsibilities as a common carrier of passengers by rail in intercity rail passenger service,” and these responsibilities were assumed by Amtrak. However, Section 402(a) of the RPSA required railroads to provide Amtrak with services, and use of their facilities, so that Amtrak could provide the passenger rail service contemplated by the Act. Amtrak was given a statutory right of access to freight railroad lines, and the Board was given jurisdiction to enforce that access and to establish the governing terms. RPSA § 402(a) (codified at 49 U.S.C. § 24308(a)(2)). As the Supreme Court has stated, these obligations to provide services and facilities to Amtrak that Section 402(a) imposed “were *consistent with the railroads' continuing obligations as common carriers*, or easily might have been imposed as conditions by the ICC if it granted the railroads' petition to discontinue rail passenger service.”

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<sup>13</sup> Pub. L. No. 91-518, 84 Stat. 1327.

*National Railroad Passenger Corp. v. Atchison, T. & S.F. Ry.*, 470 U.S. 451, 469 n. 23 (1985) (emphasis added).

CSXT's predecessors chose to enter into an operating agreement with Amtrak, and thereby be relieved of their passenger service obligations.<sup>14</sup> CSXT has perpetuated this arrangement, through entry into the Amtrak/CSXT Operating Agreement effective June 1, 1999.<sup>15</sup> The obligation borne by CSXT under this agreement to provide support for Amtrak passenger operations – derived by statute and effected through contract – is a fundamental element of CSXT's common carrier responsibilities.

Because of the structure of its proposed line sale to FDOT – where Amtrak would be left with massive liability exposure in the event of an accident involving FDOT commuter service, without any enforceable indemnity from FDOT or ability otherwise to recover from FDOT because of sovereign immunity considerations – the viability of Amtrak's intercity passenger service is fundamentally threatened by the transaction. In effect, CSXT's proposed line sale to FDOT would imperil the Amtrak passenger service which CSXT has a common-carrier-based obligation to support. This fundamental erosion of common carrier responsibility unquestionably takes this transaction out of the *State of Maine* line of authority.

Moreover, under the proposed transaction, CSXT appears to be assigning to FDOT its common-carrier-based responsibility under the RPSA to provide services and facilities to

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<sup>14</sup> Precatory language incorporated into the Amtrak/CSXT Operating Agreement notes that "as of April 16, 1971, CSXT's predecessors entered into Agreements with Amtrak (the "Basic Agreement") respecting the provision of services and facilities for intercity rail passenger operations, which Basic Agreement was subsequently amended and consolidated." See *Vilter V.S.*, Ex. 1 at 1.

<sup>15</sup> See *Vilter V.S.*, Ex. 1 (includes the precatory and liability/indemnity provisions of the Amtrak/CSXT Operating Agreement).

Amtrak. Although the Amtrak/CSXT Operating Agreement will initially continue to govern Amtrak's operations over the Orlando Line, "any agreement for renewal or extension of Amtrak's use of the State Property beyond termination or replacement of the current Amtrak-CSXT Agreement shall be a matter between State and Amtrak. . . ."<sup>16</sup> Thus, FDOT appears to step into CSXT's shoes as the entity which controls Amtrak's future access to and use of the line. This assignment of responsibility to FDOT is fundamentally at odds with the *State of Maine* requirement that all common carrier responsibilities must continue to reside unabated with the railroad seller of the line.

In sum, the Board unquestionably has jurisdiction over this transaction pursuant to 49 U.S.C. § 10901, and the limited *State of Maine* exception to that jurisdiction does not apply.

## **II. FDOT's Exemption Should Be Revoked for Failure To Meet the Requirements of 49 U.S.C. § 10901**

Pursuant to 49 U.S.C. § 10502(d), Amtrak requests that the Board revoke the exemption awarded FDOT for its proposed acquisition of the Orlando Line. For reasons discussed below, that acquisition does not satisfy the public convenience and necessity standard established under 49 U.S.C. § 10901.<sup>17</sup>

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<sup>16</sup> FDOT/CSXT Amended Operating Agreement § 3(l)(1).

<sup>17</sup> To the extent that the requirements for a petition to reopen under 49 C.F.R. 1115.4 are applicable to this petition to revoke, these requirements are fully satisfied here (in fact, the requirements should not be applicable, given that the exemption in question is not administratively final). At FDOT's request, these proceedings were suspended for approximately a year while it pursued legislation to amend Florida's sovereign immunity laws and it renegotiated its agreements with CSXT. The subject legislation was only obtained in December 2009, and FDOT only filed its amended CSXT agreements with the Board on March 31, 2010. These considerations plainly satisfy the "new evidence" and "substantially changed circumstances" elements of 49 C.F.R. 1115.4.

Today Amtrak finds itself precisely where it was when its discussions with FDOT began: it has no operating agreement with FDOT; it has no liability/indemnity agreement with FDOT; and FDOT has a state sovereign immunity defense to any claims which might be brought against it growing out of its commuter operations. This leaves Amtrak with no ability to recover from FDOT in the event that the latter's commuter operations damage Amtrak, and further Amtrak becomes a "deep-pocket" target for any claimant which would pursue a claim against FDOT but for its sovereign immunity protection, and hence looks to recover from Amtrak damages that appropriately should be borne by FDOT.

If this stark disparity in liability exposure is not resolved and the CSXT line sale moves forward, Amtrak would end up with a major exposure to FDOT commuter claims should an accident occur in which Amtrak was involved. Injured commuters in that event would be able to obtain a collective recovery from FDOT of up to only \$200,000. If CSXT were involved in the accident, injured commuters could pursue recovery from CSXT unlimited by any Florida law cap – and CSXT would in turn be indemnified by FDOT for the full amount of the recovery. But if *Amtrak* were involved in the accident, the injured commuters could pursue recovery from Amtrak also unlimited by any Florida law cap,<sup>18</sup> and Amtrak would *not* be indemnified by FDOT.

In effect, Amtrak would end up having to subsidize FDOT with respect to the latter's liability exposure growing out of its own commuter rail operations. This would materially

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<sup>18</sup> There would be a \$200 million cap on what the injured commuters could recover from all the defendants arising from a single accident or incident, pursuant to 49 U.S.C. § 28103(a)(2). Thus, the injured commuters' recovery from FDOT, CSXT, and Amtrak together could not exceed \$200 million. But this cap would still leave Amtrak with a massive exposure to FDOT commuter claims.

increase the liability exposure borne by Amtrak as a consequence of its operations over the Orlando Line. Amtrak should not be subjected to this exposure without regulatory oversight of whether this result is in the public interest, which clearly it is not.

Pursuant to 49 U.S.C. § 10901, the Board is tasked with reviewing railroad line sales under a “public convenience and necessity” standard. Because of the materially adverse impact of the proposed line sale upon Amtrak, this standard cannot be satisfied.<sup>19</sup> Indeed, where Amtrak or other passenger rail service is operated over a line, the public convenience and necessity standard of Section 10901, and the Board’s statutory obligations to support safe operations,<sup>20</sup> require the Board to consider whether a governmental entity like FDOT that seeks to acquire a rail line has the legal authority to compensate injured passengers, and to assume appropriate indemnification obligations to other railroads operating over the line. And where the entity does not possess that authority, the transaction should not be approved.

Here, public interest considerations described above dictate that the exemption granted the proposed FDOT line acquisition must be revoked.<sup>21</sup>

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<sup>19</sup> Even at a most basic level, the transaction’s adverse impact on Amtrak cannot be squared with the rail transportation policy objectives of “foster[ing] sound economic conditions in transportation, . . . ensur[ing] effective . . . coordination between rail carriers,” and “operat[ing] transportation facilities and equipment without detriment to the public health and safety.” 49 U.S.C. § 10101(5) & (8).

<sup>20</sup> See 49 U.S.C. §§ 10101(3) & (8), 10501(c)(3)(A)(i), and 24313.

<sup>21</sup> The Board has broad conditioning authority under Section 10901. Any Board approval of the proposed line sale should be conditioned upon appropriate resolution of the indemnity/liability issues identified by Amtrak, affording Amtrak the same protections accorded to CSXT.

**Conclusion**

For the reasons set forth above, the Board should deny FDOT's motion to dismiss, and should revoke the exemption afforded the proposed transaction.

Respectfully submitted,



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COUNSEL FOR NATIONAL RAILROAD  
PASSENGER CORPORATION

Dated: April 30, 2010



## **CERTIFICATE OF SERVICE**

I hereby certify this 30th day of April, 2010, that I have caused the foregoing National Railroad Passenger Corporation's Comments in Opposition to Florida Department of Transportation's Motion To Dismiss, and Related Petition To Revoke Exemption to be served on the parties identified below by the means indicated:

Thomas J. Litwiler, Esq.  
Fletcher & Sippel LLC  
29 North Wacker Drive  
Suite 920  
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(By Overnight Delivery)

Richard S. Edelman, Esq.  
O'Donnell, Schwartz & Anderson  
1300 L Street, N.W.  
Washington, DC 20005  
(By Hand)

  
\_\_\_\_\_  
George W. Mayo, Jr.

**VERIFIED STATEMENT OF  
PAUL VILTER**

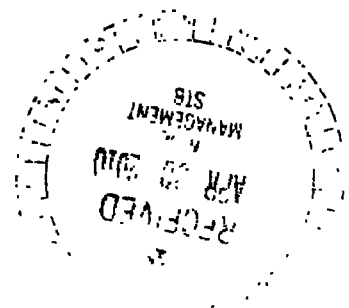
My name is Paul Vilter. I am Assistant Vice President, Host Railroads of the National Railroad Passenger Corporation ("Amtrak"), and have been employed by Amtrak in various capacities since 1999. I am competent to testify to the following facts and have personal knowledge of the truth of the matters set forth herein.

1. Appended as Exhibit 1 is a true and correct copy of the cover page, precatory language, and "Risk of Liability" provision contained in the "Agreement between National Railroad Passenger Corporation and CSX Transportation, Incorporated" (June 1, 1999).

2. Appended as Exhibit 2 is a true and correct copy of the July 17, 2008 memorandum of understanding ("MOU") between Amtrak and the Florida Department of Transportation ("FDOT").

3. Appended as Exhibit 3 is a true and correct copy of the January 21, 2010 letter from Amtrak to FDOT advising that the MOU will be terminated in 30 days barring certain developments.

4. Appended as Exhibit 4 is a true and correct copy of the February 22, 2010 letter from Amtrak to FDOT terminating the MOU.



**VERIFICATION**

I, Paul Vilter, declare under penalty of perjury that the foregoing is true and correct. Further, I certify that I am qualified and authorized to file this Verified Statement.

Executed on April 21, 2010.

A handwritten signature in black ink, appearing to read 'Paul Vilter', is written over a horizontal line.

Paul Vilter

# **EXHIBIT 1**

**Amtrak Signature Copy**

**AGREEMENT  
BETWEEN  
NATIONAL RAILROAD PASSENGER CORPORATION  
AND  
CSX TRANSPORTATION, INCORPORATED**

**June 1, 1999**

**THIS AGREEMENT is by and between the National Railroad Passenger Corporation, a corporation organized under the Rail Passenger Service Act (the "Act"), and the laws of the District of Columbia, having offices at 60 Massachusetts Avenue, N.E., Washington, DC 20002 ("Amtrak"), and CSX Transportation, Inc., a corporation formed pursuant to the laws of the Commonwealth of Virginia, having principal offices at 500 Water Street, Jacksonville, Florida 32202 ("CSXT").**

**WHEREAS, as of April 16, 1971, CSXT's predecessors entered into Agreements with Amtrak (the "Basic Agreement") respecting the provision of services and facilities for intercity rail passenger operations, which Basic Agreement was subsequently amended and consolidated;**

**WHEREAS, as of April 1, 1997, CSXT and Amtrak entered into an agreement (The "1997 Agreement") which completely restated the Basic Agreement to provide for continuing Amtrak operations on CSXT's Rail Lines at least through March 31, 2002, which agreement also terminated all other agreements between Amtrak and CSXT and its predecessors, in effect as of April 1, 1997, except for such other agreements specified therein;**

**WHEREAS, the Surface Transportation Board ("STB") under STB Finance Docket No. 33388 approved, with certain conditions, the acquisition of control of Conrail by CSX Corporation ("CSX"), of which CSXT is a wholly owned subsidiary, and**

Norfolk Southern Corporation and Norfolk Southern Railway Company (collectively "NSR") and the division of assets of Conrail by and between CSX and NSR;

WHEREAS, the Transaction Agreement among CSX, NSR and Conrail provides that certain of Conrail's lines will be allocated to New York Central Lines, LLC, which is a wholly owned subsidiary of Conrail, and will be operated exclusively by CSXT under the terms of an Operating Agreement between New York Central Lines, LLC, as owner and CSXT as operator. These lines to be allocated to New York Central Lines, LLC (hereinafter, the "Conrail Lines") include, in part, certain railroad facilities over which Amtrak now operates pursuant to an Amended and Restated Off-Corridor Operating Agreement between Conrail and Amtrak, dated as of April 14, 1996.

WHEREAS, Amtrak and CSXT have agreed to restate the 1997 Agreement by incorporating the specific service and cost items governing services and operations on the Conrail Lines into the 1997 Agreement, by providing for continuing Amtrak operations, at least through May 31, 2004, on CSXT's Rail Lines and the Conrail Lines over which Amtrak will continue to operate in accordance with this Agreement, and by terminating all other agreements between Amtrak and CSXT and its predecessors in effect as of June 1, 1999, except for the other agreements specified in Appendix VI, and have further agreed that all Amtrak operations after May 31, 1999 over the CSXT Lines and the Conrail Lines shall be governed solely by this Agreement and any applicable agreements specified in Appendix VI.

NOW THEREFORE, effective as of June 1, 1999, the parties agree, except for the other agreements identified in Appendix VI that shall remain in effect, to terminate and supersede all agreements between Amtrak and CSXT and its predecessors, replace them with this Agreement as follows, and include under this Agreement all operations over the Conrail Lines to be operated by CSXT:

#### ARTICLE I

#### DEFINITIONS

Intercity Rail Passenger Service is defined as all passenger service (except commuter rail passenger service) operated by Amtrak over the Rail Lines.

Intercity Rail Passenger Trains is defined as all trains operated in Intercity Rail Passenger Service (hereafter sometimes referred to as "Amtrak trains").

Rail Lines is defined as CSXT's Rail Lines and the Conrail Lines that will be operated by CSXT (as set forth in the recitals), which are the rights of way and real properties appurtenant thereto that are necessary to operate Amtrak's Intercity Rail Passenger Service on Rail Lines together with the roadway structures, signal systems, and other facilities thereof or appurtenant thereto used in connection with the actual operation of Amtrak trains and all of CSXT's rights to use such properties of others, subject to the terms of any applicable agreements for the use of such property of others.



**ARTICLE VI**  
**ARBITRATION**

Except as otherwise provided in section 5.1, any claim or controversy between Amtrak and CSXT concerning the interpretation, application, or implementation of this Agreement shall be submitted to binding arbitration in accordance with the provisions of the Amtrak Arbitration Agreement dated April 16, 1971, among Amtrak and certain other railroads. The parties hereby agree to be bound by the provisions of said Arbitration Agreement.

**ARTICLE VII**  
**GENERAL**

**Section 7.1 [Reserved]**

**Section 7.2 Risk of Liability**

(a) Amtrak agrees to indemnify and save harmless CSXT, irrespective of any negligence or fault of CSXT, its employees, agents or servants, or howsoever the same shall occur or be caused, from any and all liability for injuries to or death of any employee of Amtrak and for loss of, damage to, or destruction to his property; but is

expressly understood and agreed that labor furnished by CSXT for and on behalf of Amtrak under any provision of this Agreement shall not be regarded for the purposes of this Section 7.2(a) as employees of Amtrak.

(b) Amtrak agrees to indemnify and save harmless CSXT, irrespective of any negligence or fault of CSXT, its employees, agents or servants, or howsoever the same shall occur or be caused, from any and all liability for injuries to or death of, or property damage to (1) any person (other than an employee or agent of CSXT in the course of his employment or agency, except when such employee or agent is a fare-paying passenger of Amtrak) who is on a train (including private cars but excluding business cars of CSXT) operated by or for the account of Amtrak, (2) any person (other than an employee or agent of CSXT in the course of his employment or agency, except when such employee or agent is a fare-paying passenger of Amtrak) at or adjacent to a passenger station used for Amtrak service who is there in connection with the Amtrak service for the purpose of boarding or detraining from an Amtrak train, meeting a train, purchasing a ticket, making a reservation, or obtaining information about Amtrak service or conducting business with Amtrak (including a vendor from whom Amtrak receives compensation ) or passengers riding on Amtrak trains, or (3) any person at or adjacent to a passenger station who is providing local transportation to or accompanying a person described in (2) above; provided, however, that CSXT shall indemnify Amtrak for injury to, death of, or damage to any person, other than an employee of Amtrak, who is struck by improperly secured equipment or cargo of a CSXT train operated on tracks at or adjacent to a passenger station.

(c) Amtrak agrees to indemnify and save harmless CSXT, irrespective of any negligence or fault of CSXT, its employees, agents or servants, or howsoever the same shall occur or be caused, from any and all liability for, loss of, damage to or destruction of any locomotive, passenger car or any other property or equipment owned by, leased to, used by or otherwise in control, custody or possession of Amtrak. CSXT cars operated in an Amtrak train shall not be deemed to be in the control, custody or possession of Amtrak pursuant to this Subsection 7.2(c). Amtrak shall indemnify and hold CSXT harmless, irrespective of any negligence or fault of CSXT, its employees, agents, or servants, or however the same shall occur or be caused, for the cost (including any related fines or penalties) of clean up of fuel oil which CSXT demonstrates was spilled on CSXT property from an Amtrak engine or fuel oil spilled by an Amtrak contractor while fueling an Amtrak train. Amtrak further agrees to indemnify and save harmless CSXT, irrespective of any negligence or fault of CSXT, its employees, agents or servants, or howsoever the same shall occur or be caused, from any and all liability for, loss of, or damage to property of third parties caused by fuel oil spilled from an Amtrak engine and for fuel oil spilled by Amtrak's employees, agents or contractors while fueling an Amtrak train.

(d) Amtrak agrees to indemnify and save harmless CSXT, irrespective of any negligence or fault of CSXT, its employees, agents and servants or howsoever the same shall occur or be caused, and notwithstanding the provisions of Section 7.2(f) hereof, from any and all liability for injury to or death of any person and for loss of, damage to, or destruction of any property, other than persons and property for which

CSXT is responsible under 7.2(e) hereof, if such injury, death, loss, damage, or destruction arises from or is proximately caused as a result of (i) a collision of a vehicle or a person with an Amtrak train, or (ii) a collision of a derailed Amtrak train or any part thereof with any person, property or object off of the right of way.

(e) CSXT agrees to indemnify and save harmless Amtrak, irrespective of any negligence or fault of Amtrak, its agents, employees or servants, or howsoever the same shall occur or be caused, from any and all liability for injury to or death of any employee or employees of CSXT (other than those employees traveling as passengers described in Section 7.2(b) or an off-duty CSXT employee who is struck by an Amtrak train at the intersection of a public street or road) and for loss of, damage to or destruction of any property or equipment owned by, leased to, used by, or otherwise in control, custody, or possession of CSXT or its employees described above (including CSXT cars operated in an Amtrak train), other than property described in Section 7.2(c) hereof, which arises from activities conducted by or for the account of Amtrak pursuant to this Agreement.

(f) CSXT agrees to indemnify and save harmless Amtrak, irrespective of any negligence or fault of Amtrak, its employees, agents or servants, or howsoever the same shall occur or be caused, from any and all liability for injury to or death of any person or persons (other than those persons, employees or passengers for which Amtrak is responsible as provided in Section 7.2(a), 7.2(b), 7.2(d), and 7.2(i) hereof) and from any and all liability for loss, damage or destruction to any property (other than property for which Amtrak is responsible as provided in Section 7.2(a), 7.2(b), 7.2(c),

7.2(d), and 7.2(i) hereof) which arises from activities conducted by or for the account of Amtrak pursuant to this Agreement.

(g) In case suit shall at any time be brought against either Amtrak or CSXT asserting a liability against which the other agrees to indemnify and save harmless the party sued, the indemnifying party shall, at its own cost and expense and without any cost or expense whatever to the party sued, defend such suit and indemnify and save harmless the party sued against all costs and expenses thereof and promptly pay or cause to be paid any final judgment recovered against the party sued; provided, however, that the party sued shall promptly upon the bringing of any such suit against it give notice to the indemnifying party and thereafter provide all such information as may from time to time be requested. Each party shall furnish to the other all such information relating to claims made for injuries, deaths, losses, damage or destruction of the type covered by this Section 7.2 as such other party may from time to time request. Each party shall cooperate fully in the defense of claims for which the other party is responsible pursuant to this Section 7.2 with respect to activities conducted pursuant to this Agreement, including furnishing witnesses, documents, and other relevant information requested by the responsible party.

(h) Except as provided in this Subsection (h) or Subsection (j), neither party shall have the right to require a change in the terms of this Section 7.2 during the term of this Agreement. At any time after the date of this Agreement, if Congress enacts remedial liability provisions with respect to Amtrak operations, prohibiting the recovery of punitive damages or placing a cap on the amount of recoverable damages, either

party may request the other party to amend this Section 7.2 in order to afford Amtrak and CSXT the benefit of the relief granted by Congress. In the event the parties are unable to agree with respect to any proposed change in this Section 7.2 to implement the Congressional tort relief, either party may submit the matter to arbitration pursuant to Article Six of this Agreement. The arbitrator shall have no authority to increase the liability of either CSXT or Amtrak at the expense of the other pursuant to this Subsection. During the period of negotiations or arbitration, the method of handling such liability pursuant to this Section 7.2 shall remain in effect.

(i) Private railroad cars (hereinafter referred to as "PRC") moving on Amtrak trains (including Amtrak operated or sponsored Special PRC trains) will be deemed to be Amtrak cars. When PRC are set out of an Amtrak train to be later moved by another Amtrak train at an en route location on CSXT and are to remain at that location for a period of seven days or less, they shall be deemed to be Amtrak cars while at that location. When PRC are set out of an Amtrak train to be later moved by another Amtrak train at an en route location on CSXT and are to remain at that location for a period of more than seven days, they shall be deemed to be CSXT cars from the time the PRC is removed from an Amtrak train until the time it is added to an Amtrak train. PRC set out at en route locations on CSXT for further movement in freight trains (excluding switches of PRC) shall be deemed to be CSXT cars from the time the PRC are removed from an Amtrak train. Amtrak will give CSXT reasonable notice of any proposed PRC movement which is to be set out on CSXT property.

(j) In the event that Amtrak has an agreement with a freight railroad that provides solely for the operation of Amtrak trains on the rail lines and related facilities of such railroad, and if the indemnification and insurance provisions applicable to operations under such agreement are different than the provisions of this Agreement, Amtrak shall notify CSXT of the terms of such provisions. CSXT shall be entitled on a prospective basis, commencing on the date that it makes such election in writing and Amtrak acknowledges the election, to have the indemnification and insurance provisions applicable to operations under such other agreement applied to and inserted in this Agreement in lieu of the provisions of this Section 7.2. For purposes of the portion of this Section 7.2(j) set forth above, CSXT must agree to accept all provisions in the corresponding provision for allocation of risk of damage and liability and insurance requirements in the other arrangement that limit (or represent specific consideration for) the insurance and indemnity provisions, including provisions which are expressly recited as consideration for different risk of liability provisions from the terms of this Section 7.2, including provisions extending term, compensation for risk or for other services, and contractual rights and processes dealing with potential changes in the indemnification and insurance provisions. In the event Amtrak enters into an insurance pooling arrangement with two or more Class I freight railroads, CSXT shall be permitted to participate in such insurance pooling arrangement.

(k) For the purpose of this Section 7.2, "CSXT" shall be deemed to include all direct, wholly-owned railroad subsidiaries of CSXT.

## **EXHIBIT 2**





## ***Florida Department of Transportation***

**CHARLIE CRIST  
GOVERNOR**

719 S. Woodland Blvd.  
DeLand, FL 32720

**STEPHANIE C. KOPELOUSOS  
SECRETARY**

July 21, 2008

Drew Galloway  
Chief, Corridor Development  
National Railroad Passenger Corporation  
30<sup>th</sup> Street Station, Box 21  
Philadelphia, PA 19104

Dear Mr. Galloway:

Enclosed is your original copy of the Memorandum of Understanding (MOU) between the Florida Department of Transportation and AMTRAK. Thank you for your help in finalizing this document and we look forward to partnering with you in the future.

Sincerely,

Noranne Downs, P.E.  
District Five Secretary

**MEMORANDUM OF UNDERSTANDING  
BETWEEN  
STATE OF FLORIDA  
DEPARTMENT OF TRANSPORTATION  
AND  
NATIONAL RAILROAD PASSENGER CORPORATION**

**THIS MEMORANDUM OF UNDERSTANDING ("MOU")** is entered into as of this 17<sup>th</sup> day of July, 2008, by and between the STATE OF FLORIDA DEPARTMENT OF TRANSPORTATION, whose address is Haydon Burns Building, 605 Suwannee Street, Tallahassee, FL 32399-0450 ("State") and the NATIONAL RAILROAD PASSENGER CORPORATION, whose address is 60 Massachusetts Avenue N.E., Washington, DC 20002 ("Amtrak").

**WHEREAS**, State and CSX TRANSPORTATION, INC. ("CSXT") have entered into an agreement whereby State will acquire from CSXT and operate a line of railroad from Milepost A749.7(Sta. 39409+00) at or near DeLand, Florida to Milepost A814.1(Sta. 42718+10) at or near Poinciana, Florida ("State Property") and such State Property will be used for rail freight service provided by CSXT, commuter rail provided by the State and intercity rail passenger service provided by Amtrak; and

**WHEREAS**, State intends to engage in rail construction projects within and adjacent to State Property in anticipation of commencement of its Central Florida Commuter Rail Transit ("CFCRT") service over the State Property, which projects may cause temporary disruption to Amtrak service for which the State desires to accommodate Amtrak and its passengers; and

**WHEREAS**, Amtrak operates an Auto Train maintenance and yard facility in Sanford, FL ("Amtrak Facility" or "Facility"), certain portions of which may be suitable for use in servicing and maintaining CFCRT's Diesel Multiple Unit ("DMU") railcars; and

**WHEREAS, Amtrak is willing to service and maintain CFCRT's DMU railcars, subject to the negotiation of an appropriate Contractual Services Agreement between Amtrak and State; and**

**WHEREAS, Amtrak uses passenger station facilities in Winter Park and Orlando, FL and has agreed to modifications to the platform layout at such stations for use by State's CFCRT, as shown on Exhibits IV-V hereof; and**

**WHEREAS, there will be additional passenger station facilities that will require coordination between State and Amtrak for platform and other modifications; and**

**WHEREAS, the parties desire to reach a mutual understanding as to general terms and conditions regarding the matters set forth in this MOU;**

**NOW, THEREFORE, the parties indicate their understanding to be as follows:**

**I. PURPOSE.**

This MOU is entered into for the purpose of setting forth the understandings between the parties as to: (1) the provision of Bus Bridge service (as described in Section II below) for Amtrak passengers in the event Amtrak's intercity rail service is disrupted due to construction work performed by State in anticipation of CFCRT commuter rail service on State Property; (2) compensation for any Amtrak Auto Train service that must be cancelled due to such construction work; (3) negotiation of a Contractual Services Agreement pursuant to which the CFCRT DMU vehicles will be serviced and maintained at the Amtrak Facility; (4) modifications to platforms for CFCRT passenger use, initially at Winter Park and Orlando, FL, and at other locations in the future; and (5) negotiation of an Operating Agreement for Amtrak service over State Property.

The parties agree that each intends to be bound by the general understandings set forth in this MOU and to negotiate in good faith a Contractual Services Agreement and an Operating Agreement consistent with the terms of this MOU.

## **II. BUS BRIDGE SERVICE**

**A.** State shall make a good faith effort to plan and implement its construction on State Property in a manner that is least disruptive to Amtrak intercity rail service. The construction time period is estimated to be from May 2009 to and through March 2011 ("Construction Period"). In the event it becomes necessary from time to time during the Construction Period for State to request Amtrak to cancel or terminate passenger service to points in Florida south of Jacksonville, Bus Bridge service (consisting primarily of substitute bus service) shall be provided by Amtrak for affected passengers and train crews at the sole expense of State. The parties acknowledge that the Construction Period set forth above may be amended prior to actual commencement of construction.

**B.** Prior to commencement of the Construction Period, State will provide to Amtrak, for its review and approval, a proposed work schedule setting forth pre-scheduled curfew times agreed upon between CSXT and State during which State construction crews will be working on the track. Such review and approval by Amtrak shall be limited to the issue of whether the proposed work schedule will interfere with peak travel periods to or from Florida on Amtrak trains. Amtrak's approval shall not be unreasonably withheld or delayed in the instance of any such proposed interference. Following Amtrak's approval, Amtrak and State will prepare a tentative Bus Bridge plan based on the approved work schedule, including identification of specific time periods during which there will be no interruption of Amtrak train service. During the Construction Period, Amtrak and State will communicate on a no less than monthly basis (or more frequently as may be needed) to update the work schedule. State will provide Amtrak with 45 days' advance written notice of the specific dates (not to exceed more than 54 contiguous hours within any 7-day period) on which Amtrak should be prepared to implement the Bus Bridge plan. Amtrak will notify State of its acceptance or disagreement as to such dates within 2 business days of receipt of State's notice. In the event State does not receive a reply from

Amtrak within such 2-day period. State will notify Amtrak's Southern Division General Superintendent by telephone at 904-245-6620. If no acceptance or disagreement to such dates is forthcoming from Amtrak within two business days thereafter, the dates will be deemed agreed to by Amtrak. In the event Amtrak disagrees with the dates provided by State, the parties agree to consult promptly to finalize dates reasonably acceptable to the parties.

State will also make a good faith effort to provide Amtrak with a minimum of 72 hours advance notice that work schedules will not require implementation of the Bus Bridge plan on a given day and time. Once Amtrak is notified to implement the Bus Bridge plan, all costs associated with the implementation, cancellation or modification of such plan shall be at State's sole cost, regardless of whether such Bus Bridge service is actually provided to Amtrak passengers and crews.

C. When the agreed-upon schedules require, Bus Bridge service shall be provided by Amtrak for its *Silver Service* trains to and from all stations between Jacksonville ("JAX") and Tampa ("TPA") and Jacksonville ("JAX") and Miami ("MIA"). State acknowledges that significant costs are incurred each time a train is cancelled or terminated due to State's construction activities and that each cancellation or termination will necessarily mean that two trains must be cancelled or terminated (one northbound and one southbound). The estimated itemized costs for cancellation or termination of each train and the associated Bus Bridge services are set forth in Exhibit I, attached hereto. The total estimated cost should a cancellation or termination be agreed upon is \$2,036 per day. In addition, the estimated cost associated with each train and the associated Bus Bridge services is \$29,368 per train for a *Silver Meteor* train (Trains 97 and 98) and \$31,339 per train for a *Silver Star* train (Trains 91 and 92). State agrees to reimburse Amtrak for actual costs incurred in cancellation or termination of each train and provision of associated Bus Bridge services. Upon each cancellation or termination of a train, State shall pay Amtrak the appropriate estimated amounts set forth above (i.e., \$29,368 or

\$31,339 plus \$2,036/day). Actual costs, for the items specifically noted on Exhibit I, shall subsequently be reconciled as set forth in Paragraph F below.

D. Amtrak shall make a good faith effort to minimize the expense to State for Bus Bridge services. State acknowledges that Amtrak may operate additional scheduled service or special train service during the Construction Period which may require Bus Bridge service at State's expense. Amtrak will provide State with reasonable advance notice of additional planned scheduled service or special trains and will not implement plans to operate such trains without prior consultation with State.

E. The Bus Bridge service described above, and the fees and actual costs paid therefor by State, are all inclusive. Amtrak shall be solely responsible for providing the Bus Bridge service contemplated herein and for responding to all complaints or claims related thereto.

F. State payments to Amtrak for Bus Bridge service shall be made by State in accordance with State's standard vendor invoice payment procedures. Amtrak shall invoice State for the total estimated amount set forth in Paragraph C above each time Amtrak cancels or terminates a *Silver Service* train and provides associated Bus Bridge services and State shall promptly process and pay such invoice. Subsequent to the end of each calendar year, Amtrak shall provide State with a final invoice for such calendar year setting forth, for each train cancellation or termination and associated Bus Bridge service, and for the cancellation or modification of any Bus Bridge plan, the actual costs incurred broken out for each "actual" cost item set forth in Exhibit I, indicating whether the actual cost was above or below the estimated cost for those items and, for costs claimed in excess, providing reasonable substantiation therefor. The parties agree to meet to discuss reconciliation of the overcharges and undercharges indicated on Amtrak's final invoice and arrive at a final amount due for such calendar year to Amtrak or State as the case may be. State agrees it will review such invoices in good faith and

not unreasonably deny any charges claimed by Amtrak. All invoices submitted shall be in sufficient form for pre-audit and post-audit of the services performed pursuant to Section 287.058, Florida Statutes and shall be signed by an Amtrak representative who can represent that the costs and expenditures contained in said invoices are true and correct to the best of that person's knowledge or belief.

### **III. AUTO TRAINS**

A. State shall make a good faith effort to plan and implement its construction on State Property in a manner that does not require Amtrak to cancel any Auto Trains. In furtherance of this effort, Amtrak has requested that the State perform any construction work that might affect the Auto Train during the months of February and September. State agrees to make a good faith effort to do so. State will provide Amtrak with a minimum of 60 days' advance notice in the event State requires Amtrak to cancel an Auto Train and, thereafter, State shall be obligated to reimburse Amtrak for the costs related to such cancellation as set forth in Paragraph B below. State acknowledges that each such cancellation will necessarily mean that two Auto Trains must be cancelled (one northbound and one southbound).

B. For each Auto Train cancelled hereunder, State shall reimburse Amtrak \$25,000 as further described in Exhibit I. This amount is all inclusive. The State's payments to Amtrak for any Auto Train cancellation shall be made by State in accordance with State's standard vendor invoice payment procedures. Amtrak shall be solely responsible for all complaints and/or claims related in any way related to cancellation of any Auto Train. No further reconciliation of "actual" costs associated with the cancellation of an Auto Train will be required.

### **IV. PROVISION OF SERVICES AT AMTRAK FACILITY, SANFORD, FL.**

A. The parties agree they shall negotiate in good faith to enter into a Contractual Services Agreement detailing the terms and conditions for provision by Amtrak of maintenance and other services at the Amtrak Facility, e.g., : (1) monthly, 45/92/182/365 day and two year

inspections; (2) repair, replacement and servicing of DMU roof-mounted equipment; (3) axle/wheel maintenance; (4) sanding of DMU railcars on an as needed basis; (5) exterior washing of DMU railcars; (6) storage of component parts and materials for DMU maintenance; and (7) use of other buildings and tracks as need arises. All capital and operating expenses associated with any work performed by Amtrak for the State at the Amtrak Facility shall be paid by the State. All services performed at the Amtrak Facility will be provided by Amtrak employees and shall conform to generally accepted industry or other standards of workmanship and meet all state and/or federal regulatory requirements. It is anticipated that initially up to 14 CFCRT DMU railcars will require such services; provided, however, that subsequently as many as 34 DMU railcars could require such services depending of the scope and success of CFCRT passenger service. CFCRT will be solely responsible for the acquisition of all DMU cars and associated parts/infrastructure needed to maintain them in good working condition.

**B.** The initial term for the Contractual Services Agreement shall be five (5) years with annual renewal thereafter, upon agreement of both parties, for up to a total of ten (10) years.

**C.** Amtrak acknowledges that it has reviewed "Central Florida Commuter Rail Transit Technical Memorandum – Assessment of Amtrak Auto-train Yard and Maintenance Facilities at Sanford to Perform Vehicle Maintenance for the CFCRT," attached hereto as Exhibit II, has consulted with the State regarding the contents thereof and can provide the services set forth therein without significant modifications to the Amtrak Facility. The details of services to be provided, required equipment and facility modifications, and payment terms will be addressed in the Contractual Services Agreements to be negotiated by the parties.

**D.** Amtrak agrees to be bound by service schedules set forth in the Contractual Services Agreement.

**E.** Amtrak acknowledges that State will be constructing certain facilities on land in Sanford adjacent to the Amtrak Facility and hereby approves the construction layout as shown in



Exhibit III, "CFCRT Storage Yard and Maintenance Facility," attached hereto. State agrees to consult with Amtrak during construction to assure such construction does not have an adverse impact on Amtrak operations, on the safety of such operations or on the Amtrak Facility. The parties agree to negotiate in good faith to enter into agreements for use by Amtrak of track constructed or acquired by State near the Amtrak Facility provided such use does not unreasonably interfere with CFCRT operations and use of such track. Amtrak shall be responsible for maintenance of track within the Amtrak Facility; State shall be responsible for maintenance of all other track.

F. The parties agree that Amtrak's Auto Train shall have priority on entering and exiting the Amtrak Facility via the Aloma Spur.

G. Amtrak shall endeavor to provide State with reasonable advance notice in writing in the event Amtrak intends to close or cease services which may affect CFCRT operations or the maintenance of the DMU railcars at the Amtrak Facility. The Contractual Services Agreement shall address responsibility for Labor Protection or other labor costs, if any, associated with the provision of services under such Agreement, termination thereof or suspension or termination of services in whole or in part at the Amtrak Facility. As used herein, "Labor Protection" shall mean the costs, if any, incurred by Amtrak as a result of the sale of, or other suspension or cessation of services (in whole or in part) at, the Amtrak Facility, which costs may be incurred pursuant to the provision of a collective bargaining agreement or pursuant to rule, decision, or final order of any governmental agency having jurisdiction over the event or costs, if any, incurred by Amtrak or State pursuant to Federal Transit Act Section 13 (c).

#### **V. WINTER PARK AND ORLANDO, FL AMTRAK PASSENGER STATIONS**

Amtrak hereby agrees to the platform modifications which the State intends to make at the Winter Park and Orlando passenger stations as set forth in Exhibit IV, "Winter Park Station" and Exhibit V, "Orlando Park Station", attached hereto. The State shall be solely responsible for

obtaining Federal Transit Administration (FTA), Federal Railroad Administration (FRA), and any other approvals prior to construction of any platform modifications.

Amtrak further agrees it shall assist the State to obtain any FTA, FRA or other approvals for the modifications set forth in Exhibits IV and V relating to issues involving transportation and/or the Americans with Disabilities Act.

## **VI. CONTRACTUAL SERVICES AND OPERATING AGREEMENTS**

The parties agree they shall use every good faith effort to finalize by August 2008: (1) a Contractual Services Agreement and (2) an Operating Agreement for Amtrak passenger service over State Property, which will include terms and conditions regarding dispatching priority for Amtrak trains while operating on State Property, station operations, maintenance and leasing terms as applicable. The parties acknowledge that various issues (e.g., those relating to sovereign immunity, indemnity, insurance, legislation and the rights, duties and obligations of the parties) remain unresolved as of the date hereof, and that agreement on these issues must be reached before the parties can execute either a Contractual Services Agreement or an Operating Agreement.

## **VII. COORDINATION MEETINGS**

The Parties acknowledge that the understandings herein require coordination and cooperation to implement. The parties agree to make reasonable efforts to do so through effective communications and timely, well informed, decision making and, to this end, agree to:


- (1) Designate one or more representatives for coordination of the following: (a) negotiation of the Contractual Services Agreement anticipated hereunder; (b) negotiation of the Operating Agreements anticipated hereunder; and (c) to serve as a point of contact for coordination of day-to-day activities during the Construction Period, most particularly activities related to Bus Bridge service and passenger station modifications.

(2) Hold monthly meetings or conference calls of such representatives, and other appropriate personnel as designated thereby, until execution of the Contractual and Operating Agreements and thereafter through completion of Construction Period, unless such representatives agree otherwise. Regarding the Construction Period, the parties acknowledge that State and CSXT have agreed to monthly meetings and that Amtrak has been invited to participate in those meetings, which will constitute fulfillment of Amtrak's coordination agreement under this Section.

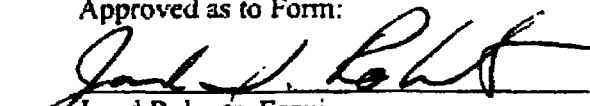
(3) Provide timely exchange of information and response to requests in order to ensure a better understanding of issues and problems and, thereby, assist in eliminating uncertainties and ambiguities. The parties agree to cooperate with one another with respect to the exchange of information that each of the parties, in its discretion, considers necessary to fulfill the requirements of this MOU.

IN WITNESS WHEREOF, State and Amtrak have caused this MOU to be executed by their duly authorized respective representatives as of the date first above written.

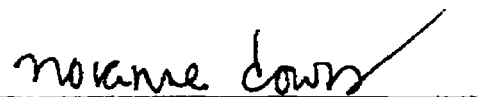
NATIONAL RAILROAD PASSENGER  
CORPORATION

By   
Alexander K. Kummant  
President and Chief Executive Officer


Approved as to Form:

  
Jared Roberts, Esquire  
National Railroad Passenger Corporation

FLORIDA DEPARTMENT OF  
TRANSPORTATION

By 

Approved as to Form:

  
Fla. Dept. Transportation  
E. Clay McGonagill, Jr., Esquire

Attached Exhibits:

**Exhibit I: Estimate of Itemized Costs for Bus Bridge Service and Cancellation of Train Sets  
Related Thereto (per instance costs)**

**Exhibit II: "Central Florida Commuter Rail Transit Technical Memorandum – Assessment of  
Amtrak Auto-train Yard and Maintenance Facilities at Sanford to Perform Vehicle  
Maintenance for the CFCRT"**

**Exhibit III: CFCRT Storage Yard and Maintenance Facility Layout**

**Exhibit IV: Winter Park Station Layout**

**Exhibit V: Orlando Park Station Layout**

## **EXHIBIT 3**

**NATIONAL RAILROAD PASSENGER CORPORATION**

60 Massachusetts Avenue, NE, Washington, DC 20002  
tel 202 906.3960 fax 202 906.2850

Joseph H. Boardman  
President and Chief Executive Officer



**BY CERTIFIED MAIL  
RETURN RECEIPT REQUESTED**

January 21, 2010

Honorable Stephanie C. Kopelousos  
Secretary of Transportation  
Florida Department of Transportation  
605 Suwannee Street  
Tallahassee, FL 32399-0450

Dear Secretary Kopelousos:

I am writing to provide formal notice that Amtrak will terminate the July 28, 2008 Memorandum of Understanding (MOU) between Amtrak and the Florida Department of Transportation (FDOT) regarding FDOT's proposed acquisition of the DeLand-to-Poinciana, Florida, rail line (the Central Florida Corridor) from CSX and the planned Sun Rail commuter service on that line. This termination will become effective 30 days after the date of this letter barring the development of an acceptable solution to meet Amtrak's legitimate concerns by that time.

Amtrak is taking this action because of FDOT's material breach of its obligations under the MOU. Section VI of the MOU required FDOT "to negotiate in good faith", and to "use every good faith effort to finalize" by August 2008:

- (i) an Operating Agreement with Amtrak to replace the 1999 agreement between Amtrak and CSX (the Amtrak-CSX Agreement) that governs Amtrak's intercity passenger train operations over the Central Florida Corridor; and
- (ii) a Contractual Services Agreement sought by FDOT under which Amtrak would maintain Sun Rail equipment at Amtrak's Sanford, Florida facility.

When FDOT entered into the MOU, it knew that – as Section VI of the MOU specifically states – "issues . . . relating to sovereign immunity, indemnity, insurance [and] legislation . . . remain unresolved . . . and that agreement on these issues must be reached before the parties can execute either a Contractual Services Agreement or an Operating Agreement." These "issues" arise out of Florida's sovereign immunity laws that, according to FDOT, preclude FDOT from assuming the indemnity obligations for which CSX is responsible under the Amtrak-CSX Agreement, and limit FDOT's liability for deaths or injuries caused by Sun Rail's operations to just \$200,000 per incident. Legislation was therefore necessary for FDOT to enter into contractual indemnity agreements with Amtrak, and to purchase insurance to enable it to fulfill its obligations under such agreements.



FDOT was aware when it entered into the MOU that Amtrak would not agree to assume additional liability exposure that is attributable solely to Sun Rail commuter operations. FDOT also knew that, under Section 4.1 of the 1999 Amtrak-CSX Agreement, Amtrak's consent is required before CSX can sell the Central Florida Corridor to FDOT. (See December 5, 2007 letter to Amtrak from Noranne Downs of FDOT, copy attached.)

Despite this, FDOT has made no effort to resolve the liability issues central to negotiating the agreements with Amtrak contemplated by the MOU, or to obtain enactment of the legislation referenced in the MOU that is necessary for FDOT to assume contractual indemnity obligations. Instead, as detailed in the appended March 31, 2009 letter from Jared Roberts of Amtrak to Clay McGonagill, Jr., of FDOT, FDOT has acted as if the MOU, and the need for FDOT to reach mutually acceptable agreements with Amtrak, did not exist.

That pattern has continued during the many months since that letter was written. When Amtrak learned through media reports that a special session of the Florida legislature was expected to consider legislation that would authorize and enable FDOT to enter into an indemnify agreement with CSX for the Central Florida Corridor, Stephen Gardner, Amtrak's Vice President, Policy and Development, wrote a letter on November 30, 2009 (copy attached) to remind you of FDOT's obligations to Amtrak under the MOU. This letter urged that FDOT work with Amtrak to ensure that the legislation for the Central Florida Corridor included provisions that would enable Amtrak and FDOT to enter into an enforceable indemnity agreement as well. To date, we have not received a response to this letter.

As Amtrak has repeatedly stated, any agreement between Amtrak and FDOT for the Central Florida Corridor must include the no-fault indemnity arrangement in the Amtrak-CSX Agreement, and legislation must be enacted that eliminates the impediments under Florida law to enforcement of FDOT's obligations under such provisions. Without such an arrangement, if Sun Rail commuter service commences and Amtrak continues to operate intercity trains over the Central Florida Corridor, Amtrak would face enormous additional liability exposure for death or injury claims by Sun Rail commuter passengers. Such increased liability and the financial risk it could represent to the Federal government, which directly funds Amtrak's operations, is simply unacceptable.

The FDOT-drafted legislation approved by the Florida Legislature in December allows FDOT to enter into an enforceable, no-fault, indemnity agreement with CSX that protects CSX from liability for claims by Sun Rail passengers. However, the legislation does not enable FDOT to enter into a comparable agreement with Amtrak.

The December legislation also does not resolve the ambiguities in the version of the bill rejected during the 2009 regular legislative session, described on page 3 of Amtrak's March 31, 2009 letter, with respect to FDOT's authority to provide indemnity/insurance to Amtrak in connection with the equipment maintenance services Amtrak was to have provided for Sun Rail at Amtrak's Sanford, Florida facility. However, that issue will be mooted by the termination of the MOU.

*Honorable Stephanie C. Kopelousos  
January 21, 2010  
Page 3*



For Amtrak, the potential termination of the MOU is a disappointing outcome. Florida has enormous untapped potential for passenger rail service – high speed, intercity, and commuter – that has not been realized to date. The Federal government's unprecedented funding support for passenger rail expansion provides a window of opportunity for translating that potential into reality. For that to happen, Florida must address the statutory and other impediments that have inhibited the development of passenger rail service in Florida, and have precluded Amtrak and FDOT from reaching agreements.

Amtrak remains willing to work with FDOT on the development and enactment of an amendment to the December legislation which would enable FDOT to enter into an enforceable, no-fault, indemnity agreement with Amtrak that is consistent with the existing agreement between Amtrak and CSX. A commitment by FDOT to this course of action within the next 30 days, and entry into an enforceable indemnity agreement following enactment of the necessary legislation, are required for Amtrak's support of the project and our continued willingness to participate under the terms of our MOU. I urge you to please let me know immediately if FDOT is interested in such cooperation.

Sincerely,

A handwritten signature in black ink, appearing to read "Joe Boardman", written over a horizontal line.

Joseph H. Boardman  
*President and Chief Executive Officer*

Attachments





## ***Florida Department of Transportation***

**CHARLIE CRIST**  
GOVERNOR

719 S. Woodland Blvd.  
Deland, FL 32720

**STEPHANIE C. KOPELOUSOS**  
SECRETARY

December 5, 2007

**VIA REGULAR MAIL AND FACSIMILE**

Mr. Jared I. Roberts  
Deputy General Counsel  
AMTRAK  
60 Massachusetts Ave., NE  
Washington, DC 20002

Dear Mr. Roberts:

This is to acknowledge receipt of your November 30, 2007, letter in which you brought to our attention the language of Section 4.1 of the Agreement Between National Railroad Passenger Corporation And CSX Transportation, Incorporated, dated June 1, 1999, as amended.

Sincerely,

Noranne Downs, P.E.  
District Five Secretary

cc: Peter J. Shultz, Esq., CSXT



March 31, 2009

E. Clay McGonagill, Jr., Esq.  
Special Counsel  
Florida Department of Transportation  
605 Suwannee Street  
Tallahassee, FL 32399-0450

Re: Florida Department of Transportation – Central Florida Commuter Line

Dear Clay:

This is in response to your March 24, 2009 letter.

Several topics were left unmentioned in your letter, the most significant being the July 13, 2008 Memorandum of Understanding between FDOT and Amtrak. That MOU embodies the initial, and to date only, agreements between FDOT and Amtrak relating to FDOT's proposed acquisition of the CSXT line through Orlando (the Orlando Line).

As indicated in the MOU, FDOT plans to initiate commuter rail service over the Orlando Line, and wishes to have Amtrak provide equipment maintenance services for its commuter rail equipment at Amtrak's Auto Train facility in Sanford. To accomplish those goals, the MOU contemplates two agreements between FDOT and Amtrak: an Operating Agreement governing Amtrak's intercity train operations over the Orlando Line, and a Contractual Services Agreement under which Amtrak would provide maintenance services for the commuter equipment.

Section VI of the MOU states, in part, that:

The parties acknowledge that various issues (e.g., those relating to sovereign immunity, indemnity, insurance, legislation and the rights, duties and obligations of the parties) remain unresolved as of the date hereof, and that agreement on these issues must be reached before the parties can execute either a Contractual Services Agreement or an Operating Agreement.

The references to sovereign immunity, indemnity, insurance and legislation reflect FDOT's assertions that, under Florida law, legislative approval is required for FDOT to enter into enforceable indemnity obligations. See Section 21 of the November 30, 2007 Central Florida Operating and Management Agreement between FDOT and CSXT, which states that, absent approval by the Florida Legislature, FDOT "cannot

E. Clay McGonagill, Jr., Esq.  
March 31, 2009  
Page 2



contractually indemnify and save harmless CSXT or any other party" with respect to operations over the Orlando Line.

Also unmentioned in your letter is the fact that in February 2008, which was several months prior to the MOU, Amtrak sent FDOT a proposed Operating Agreement. Notwithstanding its obligation under the MOU to "negotiate in good faith" and "use every good faith effort to finalize" agreements with Amtrak by August, 2008," FDOT waited until mid-February of this year (five and a half months after the MOU deadline for finalization of an agreement, and over a year after receiving Amtrak's draft Operating Agreement) to respond. At that time, i.e., in February 2009, FDOT proposed, without explanation or justification, an almost entirely new Operating Agreement that bears little resemblance to Amtrak's proposed draft.

Amtrak has numerous issues with FDOT's proposed Operating Agreement. Most importantly, FDOT has ignored its obligation under the MOU to negotiate with Amtrak regarding liability/indemnity legislation. Instead, FDOT has, without consulting Amtrak:

endorsed legislation currently pending in the Florida legislature that would enable FDOT to honor indemnity obligations to CSXT but not to Amtrak; and

proposed Operating Agreement language that would limit FDOT's contractual obligation to indemnify Amtrak "to the extent permitted by law," which seemingly means that FDOT is proposing indemnity that FDOT asserts would be unenforceable.

The liability provisions FDOT has proposed are similar to those in a 12-year old FDOT/Amtrak agreement governing the Dyer-to-Miami line (the "South Florida Line"). However, as I pointed out during our March 17 telephone conversation, Amtrak has repeatedly told FDOT that Amtrak cannot accept such a liability arrangement, e.g., when you and Amtrak's outside counsel, Carol Licko, spoke on February 22, 2008.

Given that we've made this point on several occasions, and that FDOT itself has indicated that without legislation it cannot provide indemnity, we were very surprised to see the indemnity language in FDOT's draft Operating Agreement. That language directly contradicts FDOT's recent public statements in support of the pending bill that would authorize FDOT to enter into an insurance-backed no fault liability arrangement with CSXT. According to the March 5, 2009 issue of the *Orlando Sentinel*:

DOT general counsel Alexis Yarborough said without the insurance arrangement, "we will be bogged down for years in hundreds of lawsuits trying to determine who was at fault for what" after a wreck.



FDOT's addition of commuter rail service to the Orlando Line will create significant new liability exposure associated with commuter passengers. Amtrak's current agreement with CSXT contains the passenger railroad industry's standard "no fault" allocation of liability, and CSXT honors its obligations to compensate injured persons for whom it is liable under that agreement. FDOT is proposing to replace that agreement with an indemnity arrangement that FDOT itself has publicly asserted is unenforceable. What that means is that, if there is an accident involving Amtrak and FDOT trains that causes death or injuries to FDOT's commuter passengers, FDOT could walk away from its liability and indemnity obligations after paying just \$200,000 — even if the accident was caused by FDOT's gross negligence — leaving Amtrak to bear enormous liability exposure for FDOT's passengers. Amtrak will not enter into such an agreement.

The 2009 bill that FDOT has endorsed — without any attempt to reach agreement with Amtrak, as required by the MOU — may also preclude Amtrak from providing equipment maintenance services for FDOT's proposed Central Florida commuter service. As acknowledged in your letter, the bill does not include a provision that would extend FDOT's sovereign immunity to commuter rail, as is the case under the existing statutory provision that applies to FDOT's South Florida Line. It is also not clear whether FDOT contractors that provide services required for the Central Florida commuter service — such as the equipment maintenance services that FDOT wishes Amtrak to provide — would be deemed "commuter rail service providers" that FDOT would be authorized to indemnify through the purchased insurance and self-insurance retention fund authorized by that bill.

Under the current version of the bill, Amtrak, or any entity providing contracted services, would have potentially enormous liability exposure, unconstrained by sovereign immunity, for which FDOT may not be able to provide insurance/self insurance under the ambiguous language in the bill. It is difficult for us to see how FDOT can reasonably expect Amtrak to accept such exposure.

From Amtrak's perspective, FDOT has consistently ignored its obligation under the MOU to negotiate with Amtrak regarding sovereign immunity, indemnity, insurance, legislation, and other contract issues. The MOU states "agreement on these issues must be reached before the parties can execute either a Contractual Services Agreement or an Operating Agreement." So as to provide some specifics as to why we feel this way, I am setting out below a chronological list of some of Amtrak's efforts to engage with FDOT over more than a year's time.

\* February 4, 2008: After being advised by Janet Gilbert that she would be representing FDOT in the negotiation of an Operating Agreement, Amtrak's Gary Reinoehl emailed her Amtrak's proposed Operating Agreement and advised that he would be Amtrak's designated representative. Ms. Gilbert indicated that she would provide FDOT's suggested changes shortly. (As indicated above, FDOT's response came over a year later.)

B. Clay McGonagill, Jr., Esq.  
March 31, 2009  
Page 4



- \* February 22, 2008: As indicated above, Carol Licko informed you of Amtrak's concerns regarding indemnity and liability.
- \* December 4, 2008: At a meeting in Florida, FDOT's Assistant Secretary Hunt told Amtrak's Drew Galloway that the indemnity/liability issue would be addressed "before Christmas."
- \* January 7, 2009: During a telephone conversation, Mr. Galloway pointed out to Ms. Hunt that Amtrak had heard nothing from FDOT regarding indemnity/liability, and that the indemnity being provided by FDOT to CSXT would be acceptable to Amtrak, but that anything less would not.
- \* February 21, 2009: After receiving FDOT's draft Operating Agreement, Anne Witt, Amtrak's Vice President – Strategic Partnerships & Business Development, spoke with Ms. Hunt requesting FDOT's attention to the indemnity/liability issue now being considered by the Florida legislature.
- \* February 24, 2009: Ms. Witt had a brief telephone conversation with Ms. Hunt who was in a meeting and who promised to call back that evening. Ms. Hunt never returned the call.
- \* February 25, 2009: Ms. Witt sent an email to Ms. Hunt outlining Amtrak's liability/indemnity concerns. No response was received.
- \* February 27, 2009: Ms. Witt called the office of FDOT Secretary Kopelousos, indicating that she had an "urgent" matter to discuss with the Secretary. A return call was promised, but never received. Later that day Ms. Witt left a voicemail message on Secretary Kopelousos's cell phone expressing disappointment at the lack of a return call, identifying the liability issue and the current legislative efforts, and expressing a willingness to work with FDOT for a solution. No response was received.

Finally, I want to emphasize that Amtrak remains willing to work with FDOT to reach a solution. However, as we have made clear from the outset, any solution must ensure that FDOT's indemnity obligations are enforceable.

Sincerely,

  
Jared I. Roberts  
Acting Managing Deputy General Counsel

Stephen J. Gardner  
Vice President, Policy and Development



November 30, 2009

Honorable Stephanie C. Kopelousous  
Secretary of Transportation  
Florida Department of Transportation  
605 Suwannee St.  
Tallahassee, FL 32399-0450

Dear Secretary Kopelousous:

Amtrak has followed with great interest the renewed discussions concerning legislation for the Sun Rail commuter project. We at Amtrak continue to recognize the multiple benefits that the Sun Rail project could bring to central Florida and we were pleased to assist the State with the development of a Service Development Plan for the Central Florida Corridor in support of Florida Department of Transportation's (FDOT) "Track 1a" ARRA grant application earlier this year. As such, Amtrak remains willing to honor the terms and conditions of the Amtrak / FDOT MOU for the Sun Rail project that we jointly agreed to in 2008, including our willingness to service and maintain different rail vehicles than the type originally envisioned for the Sun Rail project.

In this regard, however, FDOT and Amtrak need to address the critically important issue concerning the State's commitment and authority under Florida law to provide adequate indemnity for Amtrak in connection with both Amtrak's continued operations over the Central Florida Corridor and the maintenance of Sun Rail equipment at Amtrak's Sanford facility. I have taken the liberty of setting out below the section of the MOU which addresses this topic:

**VI. CONTRACTUAL SERVICES AND OPERATING AGREEMENTS**

"..... The parties acknowledge that various issues (e.g., those relating to sovereign immunity, indemnity, insurance, legislation and the rights, duties and obligations of the parties) remain unresolved as of the date hereof, and that agreement on these issues must be reached before the parties can execute either a Contractual Services Agreement or an Operating Agreement."



We continue to believe our indemnity requirements – a no-fault liability agreement that is enforceable under Florida law – are both reasonable and justified. This is the standard liability apportionment arrangement in the railroad industry, and is the liability arrangement we have with CSX for our operations over the same railroad line today that would be conveyed to the State for the Sun Rail project. As we have indicated previously, we cannot agree to extend to the Central Florida Corridor the liability/indemnity provisions that currently govern Amtrak's operations over FDOT's South Florida line, particularly since FDOT has asserted that its indemnity obligations in that agreement are unenforceable under Florida law.

Resolving this issue now has heightened importance, as a key criteria guiding the FRA's evaluation of High Speed Rail and Intercity Passenger Rail grant applications is an agreement relating to the proposed project between all operating parties affected by the project. Given this and the fact that the current operating agreement between Amtrak and CSX requires Amtrak's consent in order for CSX to effectuate any sale any of the rail lines over which Amtrak operates, it is imperative that we reach a understanding with the State on this matter as soon as possible. While legislative authorization is necessary for FDOT to enter into an enforceable indemnity agreement with Amtrak, I believe this can be done with minor wording changes in the legislation that will be required to enable FDOT to enter into such an agreement with CSX. You have my pledge to consider all reasonable means to accomplish this objective.

We continue to believe that FDOT and Amtrak have many interests in common and we are excited to work in partnership with you and the State to expand and improve intercity and high speed passenger rail service throughout Florida. In particular, we look forward to the development of, and our potential participation in, the Tampa to Orlando high speed rail program, as well as the realization of the Florida East Coast Corridor service. And, we continue to endorse the principles behind Sun Rail. These are substantive, worthy programs and we hope to help Florida achieve success in all of these endeavors.



I look forward to further discussion with you on these important matters and I encourage you to contact me at your earliest convenience so that we can discuss the indemnity issues identified above in greater detail.

Sincerely,

A handwritten signature in dark ink, appearing to read "Stephen J. Gardner", written over a circular stamp.

Stephen J. Gardner  
*Vice President, Policy and Development*

Cc: Chairman Senator Andy Gardiner  
Vice-Chairman Senator Larcenia J. Bullard  
Chairman Representative Dave Murzin  
Vice-Chairman, Representative Ed Hooper  
Chairman Jeremy Ring  
Chairwoman Corrine Brown  
Ranking Member John Mica



## **EXHIBIT 4**

**NATIONAL RAILROAD PASSENGER CORPORATION**

60 Massachusetts Avenue, NE, Washington, DC 20002  
tel 202 906.3960 fax 202 906.2850

**BY EMAIL, FAX AND FEDERAL EXPRESS**

Joseph H. Boardman  
President and Chief Executive Officer



February 22, 2010

The Honorable Stephanie C. Kopelousos  
Secretary  
Florida Department of Transportation  
605 Suwannee Street  
Tallahassee, FL 32399-0450

Dear Secretary Kopelousos:

The July 28, 2008 Memorandum of Understanding (MOU) between Amtrak and the Florida Department of Transportation (FDOT) regarding FDOT's proposed acquisition of the DeLand to Poinciana, Florida, rail line (the Central Florida Corridor) from CSX and the planned Sun Rail commuter service on that line is terminated.

Amtrak is taking this action for all the reasons stated in my January 21, 2010 letter on this same subject, and because FDOT has failed to provide Amtrak any communication that FDOT has recognized or tried to address the legitimate business concerns that Amtrak and FDOT jointly discussed in our meeting on Capitol Hill on January 27, 2010.

Amtrak wishes to serve its customers that want to travel to and from Florida, and also wishes Florida well in its effort to improve passenger rail services. However, Amtrak must protect its own business integrity, and it must ensure that, if there is an accident involving a Sun Rail commuter train, the costs of compensating injured Sun Rail passengers are borne by FDOT rather than by the federal taxpayers outside of Florida who fund Amtrak's operations. This means that FDOT must obtain authorization under Florida law to enter into enforceable contractual indemnity agreements with Amtrak, and to purchase insurance so that it can fulfill its obligations under such agreements. I have asked Amtrak's Law Department to provide your attorneys with legislative language that would amend the recently enacted CSX indemnification legislation to authorize FDOT to provide the same indemnity to Amtrak.

Until FDOT recognizes the legitimate business concerns that Amtrak has explained in many past (oral and written) communications in the January 21, 2010 letter, and in the January 27, 2010 meeting, no one at Amtrak will be authorized to discuss or negotiate any new agreements with Florida on this or any other service contemplating the use of Amtrak.

Sincerely,

A handwritten signature in black ink, appearing to read "Joseph H. Boardman", written over a horizontal line.

Joseph H. Boardman  
President and Chief Executive Officer

cc: The Honorable Corrine Brown  
The Honorable John Mica  
Eleanor Acheson  
Stephen Gardner  
Joseph McHugh